91-1138

No. _____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

HUGHES DEVELOPMENT COMPANY, INC.,
FRANCIS R. HUGHES, and BERNADETTE J. HUGHES,
Petitioners,

v.

Great Plains Capital Corporation

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Charles A. Cox*
COX & GOUDY
600A Butler Square
100 North Sixth Street
Minneapolis, Minnesota 55403
(612) 338-1414

Counsel for Petitioners.

*Counsel of Record

1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

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QUESTIONS PRESENTED FOR REVIEW

Where a consumer loan transaction violates the Truth In Lending Act, 15 U.S.C. §1601 et seq.:

(a) Does a mortgage given as security for the loan become void upon the obligor's election to rescind the transaction or may the court condition rescission, and the release of the mortgage, upon the obligor first tendering the outstanding principal amount owed? and

(b) If the obligor fails to tender the outstanding principal, may the court award interest, attorney's fees and real estate taxes under state law upon foreclosure of the mortgage?

PARTIES

Petitioners are as listed in the caption. By an order entered September 24, 1991, the Circuit Court substituted Great Plains Capital Corporation, a Nebraska corporation, as appellee in the stead of the Federal Deposit Insurance Corporation.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HUGHES DEVELOPMENT COMPANY, INC.,
FRANCIS R. HUGHES AND
BERNADETTE J. HUGHES,

Petitioners.

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioners, Francis R. Hughes and Bernadette J. Hughes, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The district court's order of April 12, 1988, is reported at 684 F. Supp. 616 (D. Minn. 1988). All of the remaining orders of the district court in this matter are unpublished. The decision of the United States Court of Appeals for the Eighth Circuit from which certiorari is sought is reported at 938 F.2d 889 (8th Cir. 1991). The circuit court's order denying a rehearing is unpublished.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit's decision and judgment was entered on July 11, 1991. The cirucit court's order denying Petitioners' timely request for rehearing was entered on September 24, 1991. The jurisdiction of the Court rests upon 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. §1635

Regulation Z, 12 C.F.R. §226.23

STATEMENT OF THE CASE

Petitioners, Francis R. Hughes and Bernadette J. Hughes, borrowed $100,000 from the Guaranty State Bank of St. Paul in June of 1982. The home improvement loan was secured by a mortgage on the Hughes' homestead. On June 20, 1984, the Hughes sent a letter to the Guaranty Bank rescinding the loan transaction because the bank had failed to make certain disclosures required under the Truth In Lending Act (TILA) and associated regulations. Several weeks after the Hughes notice of rescission was sent, the bank was declared insolvent and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver.

The FDIC, which purchased the Hughes' note and mortgage, declared the Hughes to be in default on their note and commenced foreclosure by action against the Hughes in United States District Court for the District of Minnesota. Jurisdiction for the FDIC's action was founded upon 12 U.S.C. §1819 and 28 U.S.C. §1345. The Hughes asserted a counterclaim alleging TILA violations. Both parties moved for summary judgment. By an order dated March 18, 1988, which was vacated and slightly modified by two orders of April 12, 1988, the District Court granted partial summary judgment in favor of the Hughes, determining that the loan and mortgage transaction had not conformed with TILA. However, because the Hughes' financial condition was questionable the trial court conditioned rescission of the

transaction, and a discharge of the mortgage, upon the Hughes first repaying within one year the $100,000 in principal owed on the note. If the principal was not repaid within this period the FDIC would be entitled to foreclosure. The district court also directed that the Hughes would receive credit for any interest they had paid, with the FDIC receiving credit for all real estate taxes it had paid with respect to the Hughes' property. Neither party appealed from these orders.

The Hughes did not tender the $100,000 and the FDIC moved for summary judgment for a decree of foreclosure. The FDIC's motion was granted by an order dated June 18, 1990, permitting the property to be sold and awarding the FDIC, pursuant to Minnesota law, the principal owed, all

unpaid interest, real estate taxes and attorney's fees.

As is relevant to the questions before this court, the Hughes appealed two aspects of the district court's orders. First, the Hughes contended that the district court, having concluded that a violation of TILA had occurred, could not require them to repay the principal owed prior to the mortgage being discharged. The Hughes asserted that under the plain language of TILA the mortgage became void when they notified the Guaranty Bank that they were rescinding the transaction. Next, the Hughes claimed that the trial court had erred by awarding the FDIC interest, attorney's fees and reimbursement for real estate taxes on the ground that TILA precluded their liability for such items.

The court of appeals affirmed the district court's rulings. The circuit court acknowledged that TILA generally requires the creditor to release security obtained in the transaction before the debtor must repay the loan. The court, however, then held that TILA authorized the district court, in its discretion, to condition rescission upon the debtor first repaying the principal owed.[1] With respect to the award of interest, fees and real estate taxes, the circuit court concluded that TILA was not applicable because the loan and mortgage were not rescinded by reason of the Hughes'

[1] The FDIC contended that the circuit court did not have jurisdiction to consider the Hughes' appeal on this issue because the time for seeking review of the court's order of April 12, 1988, had expired. The circuit court did not decide this point and considered the Hughes' appeal on its merits.

failure to tender $100,000. Under this reasoning, the items awarded were properly assessed under state foreclosure law.

Reasons For Granting The Petition

TILA and regulations promulgated thereunder provide substantial protections to consumers in their dealings with lenders. TILA is a remedial statute, which is to be construed broadly in favor of the consumer. Murphy v. Ford Credit Co., 529 F.2d 556, 559 (8th Cir. 1980). One of the more significant of these protections is the consumer's right to rescind the transaction if the notice requirements of the Act are not strictly complied with by the lender. The district court's decision, and the court of appeals' affirmance, stands this protection on its

head by placing the onus of restoring the status quo of the parties on the consumer. Moreover, the court of appeals' decision directly contradicts the explicit language of Section 1635 of the Act and Regulation Z. This constitutes such a departure from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision is warranted. Finally, the rescission provisions of TILA and Regulation Z have never been interpreted by this Court. Given the importance of a consumer's right to rescind under this federal statute, and the braod impact any interpretation of such right may have, further review by this Court should be granted.

a. Right to Rescind.

The fundamental flaw in the reasoning of the district and circuit courts in this matter is that both courts held that the Hughes' right to rescind is subject to being made conditional.

A consumer's right to rescind under TILA is established in subparagraph (a) of section 1635 and is effectuated solely by the consumer giving the creditor notice of his or her decision to rescind. There is no indication in subparagraph (a) whatsoever that the Congress intended that the courts may limit a consumer's right to rescind under TILA merely because common-law rescission is an equitable remedy.

Moreover, while the majority of circuit-level decisions applying rescission under TILA generally support the Eighth Circuit's decision in this

case, see, e.g., Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980); Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976), other court of appeals' holdings bring into doubt the authority of a court to condition rescission upon repayment of the underlying debt. In Gerasta v. Hibernia National Bank, 575 F.2d 580 (5th Cir. 1978), the court ruled that the consumer was required to return the creditor's property only if the creditor, within 20 days of the notice of rescission, returns the consumer's downpayment and terminates of record any security interest it obtained in the course of the transaction. In a later opinion, Harris v. Tower Loan of Mississippi, Inc., 609 F.2d 120, 123 (5th Cir. 1980), the Fifth Circuit again acknowledged that the consumer's basic

right to rescind could not be conditioned upon the consumer first having to return the money borrowed: "Gerasta also forecloses an argument that the creditor's duties are conditioned upon tender by the obligor." The Harris court did allow a direct off-set of the money that first must be returned to the consumer against what the consumer then would have to repay to the creditor because such an offset was not expressly prohibited by section 1635(b). The Harris court, however, was careful to note that the offset was not being made a condition to rescission. Id. Thus, in Harris rescission of the transaction was complete and not effected by the court allowing an off-set.

Next, in Powers v. Sims & Levin, supra, which is a case the Eighth Circuit relied

upon in the present matter, one member of the three-judge panel strongly dissented from the majority's reliance on the court's inherent equitable power as the basis for conditioning rescission upon the consumer first making the creditor whole. The dissent viewed section 1635 as presenting a very clear-cut statute with very clear-cut ramifications; namely that rescission occurs as soon as the notice of rescission is sent and that any security interest obtained by the creditor is immediately void regardless of whether the consumer repays the loan. 542 F.2d at 1225 (Winter, J., dissenting). While the creditor would have collection remedies under state law, TILA simply did not allow the court to impose repayment as a condition precedent to rescission. Id.

Finally, there are a number of lower court decisions applying TILA in a straightforward fashion in which the right to rescind may not be encumbered by the obligor first having to tender return of the creditor's property or funds. See, e.g., Gill v. Mid-Penn Consumer Discount Co., 671 F. Supp. 1021, 1026 (E.D. Pa. 1987), aff'd, 853 F.2d 917; In re Chaney, 33 B.R. 355, 356 (D. Okla. 1983); French v. Wilson, 446 F. Supp. 216 (D. R.I. 1978); Myrick v. Finance American Credit Corp., 404 So.2d 700, 703 (Ala. App. 1981). After a violation of the disclosure requirements of TILA, the transaction is rescinded upon the consumer giving timely notice. Under the plain language of the statute, this right is not contingent or conditional. The Eighth Circuit's holding that the Hughes'

right to rescind their loan could be made dependent upon their repayment of the $100,000 principal amounts to a judicial rewrite of a clear statute. As such, it is erroneous.

b. Effect of Rescission

When the Hughes effectively rescinded the transaction upon their mailing the notice in 1984, two consequences immediately occurred under subparagraph (b) of section 1635. First, the Hughes were "not liable for any finance or other charge" arising from the transaction. Second, the mortgage given to the Guaranty Bank, which was later bought by the FDIC, became "void." Again, these two results are mandated by the express provisions of TILA and are not subject to modification by a court. As a result the Hughes remained liable for payment of the

principal, but they were not responsible for interest. Further, as their mortgage was void, there could be neither a foreclosure nor an award of associated costs such as attorney's fees or real estate taxes.

The last sentence of subparagraph (b) does state that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." It is clear, however, that this sentence permits a court to modify the mechanics of exchanges of property between creditor and consumer and does not extend to liability for finance charges or the validity of security

interests.[2] Relief from finance charges and having security interests terminate as a matter of law are substantive consequences of a violation. They are not mere "procedures."

This interpretation coincides exactly with the provisions of Regulation Z that implement section 1635 of TILA. 12 C.F.R. §226.23 (d) sets forth the effects of rescission. Subparagraph (1) indicates that upon rescission the creditor's security interest "becomes void" and that the consumer is not responsible for finance charges.

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[2] This provision also would not grant a court authority to make rescission conditional upon the consumer first repaying his or her loan. The right to rescind vests under subparagraph (a) whereas the sentence referred to concerns only procedures in subparagraph (b).

Subparagraphs (2) and (3) then set the procedures under which property may be exchanged between consumer and creditor. Subparagraph (4) concludes the subsection by stating that "[t]he procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order." Only one conclusion may be drawn from the failure to include subparagraph (1) in this provision: The invalidity of a creditor's security interest and non-liability for finance charges simply are not subject to modification.

Accordingly, the mortgage upon which the FDIC based its foreclosure action was void as of the day the Hughes notified Guaranty Bank they were rescinding their loan. Under TILA and Regulation Z the court could not breathe life back into the mortgage under equitable powers that

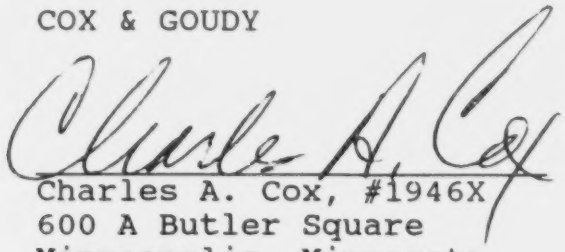
were powerless here.

CONCLUSION

The Eight Circuit's interpretation of TILA with respect to a consumer's right to rescind the transaction is directly contrary to the plain meaning and intent of the Act and Regulation Z. If the disclosure requirements are not met, the consumer has an absolute right to rescind and a court may not hinder that right by first requiring the consumer to repay the loan. Also, immediately upon rescission, any security interest obtained by the creditor becomes void and the creditor may not subsequently enforce that interest against the consumer. This may result in an occasional hardship to the creditor, but that is the framework that the Congress has erected. If changes are to be made in this basic framework, such

a change should come from the Congress rather than judicial legislation masquerading as the equitable powers of a court. For these reasons this Court should grant the petition.

COX & GOUDY



Charles A. Cox, #1946X
600 A Butler Square
Minneapolis, Minnesota
55403
612-338-1414
Attorneys for Petitioners

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15 U.S.C. §1635

Right Of Rescission As To Certain Transactions

Disclosure of Obligor's Right to Rescind

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

Return of Money or Property
Following Rescission

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section,t he obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests int he obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

Rebuttable Presumption of Delivery of Required Disclosures

(c) Notwithstanding any rule of evidence, written acknowledgement of receipt of any disclosures required under this subchapter by a person to whom information, forms and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

Modification and Waiver of Rights

(d) The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

Exempted Transactions; Reapplication of Provisions

(e)(1) This section does not apply to-

(A) a residential mortgage transaction as defined in section 1602(2) of this title;

(B) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the

same property;

(C) a transaction in which an agency of a State is the creditor; or

(D) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(2) The provisions of paragraph (1)(D) shall cease to be effective 3 years after the effective date of the Truth in Lending Simplification and Reform Act.

Time Limit for Exercise of Right

(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale

of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

Additional Relief

(g) In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

Regulation Z, 12 C.F.R. § 226.23

Right of rescission.

(a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer in a transaction has the right to rescind, the

exercise of the right by one consumer shall be effective as to all consumers.

(b) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) Delay of creditor's performance. Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d) Effects of rescission. (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) Delay of creditor's performance. Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d) Effects of rescission. (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made

at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) Consumer's waiver of right to rescind. The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of

all of the consumers entitled to rescind. Printed forms for this purpose are prohibited.

(f) Exempt transactions. The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.

(3) A transaction in which a state agency is a creditor.

(4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 226.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional insurance premiums that is not considered a refinancing under § 226.20(a)(5).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-223

Federal Deposit Insurance Corporation, in its corporate capacity,

Plaintiff,

v.

Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes,

Defendants.

Karen Park Gallivan, Esq. and Rider, Bennett, Egan & Arundel, 2500 First Bank Place West, Minneapolis, MN 55402 for plaintiff.

Ann K. Newhall, Esq., Dale M. Wagner, Esq. and Moss & Barnett, 1200 Pillsbury Center, Minneapolis, MN 55402 for defendants.

ORDER

This case comes before the Court on a motion for summary judgment by plaintiff Federal Deposit Insurance Corporation ("FDIC") and a cross motion for partial summary judgment by the defendants Hughes

Development Company, Inc. ("HDCI"), Francis R. Hughes ("Mr. Hughes"), and Bernadette J. Hughes ("Mrs. Hughes").

FACTUAL BACKGROUND

In 1982, Mr. Hughes and Guaranty State Bank of St. Paul ("Bank") executed a Combination Note, Security Agreement and Disclosure ("Cathedral Court Note") in the amount of $300,000 on behalf of HDIC. Mr. Hughes intended to use the proceeds to remodel three commercial condominium units located in the Cathedral Court complex developed by HDCI and owned by the Hugheses. To secure the note, Mr. and Mrs. Hughes signed a Security Agreement and Mortgage Deed ("Cathedral Court Mortgage"), granting a mortgage interest to the Bank in the three condominium units. Mr. and Mrs. Hughes also signed a Guaranty which provided

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that the couple would promptly pay any existing and future indebtedness from HDCI to the Bank.

On the same day, Mr. and Mrs. Hughes signed a Combination Note, Security Agreement and Disclosure in the amount of $100,000 ("Lombard Note"), the loan proceeds from which were to be used to remodel the family residence on Lombard Avenue, St. Paul, Minnesota. Mr. Hughes alleges that, before he and the Bank signed the loan documents, the Bank agreed to refinance the Lombard loan after completion of the home improvements. The terms of this agreement appear in a letter signed by both Mr. Hughes and Harry Jensen, the Bank's president.

In 1984, the FDIC was appointed receiver of the Bank's property and

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business after the Bank was adjudged insolvent. The FDIC, in its corporate capacity, purchased the Cathedral Court Note, the Cathedral Court Mortgage, the Lombard Note, and the Lombard Mortgage from the Bank. After purchasing these assets from the Bank, the FDIC discovered that the defendants had defaulted in their payments, and that the Hugheses had been delinquent in the payment of real estate taxes. The FDIC paid $8,324.07 in delinquent Cathedral Court property taxes, and $4,686.23 in delinquent real estate taxes for the Lombard property.

Approximately one month before the Bank was adjudged insolvent, Mr. Hughes allegedly sent a letter to the Bank ("rescission letter") notifying its officials that they had failed to make certain disclosures on the Lombard loan,

as required by the Truth-In-ending Act. He stated in this letter that he wished to rescind and cancel the Lombard loan agreement. Apparently, neither this letter of rescission nor the letter agreement on refinancing appeared in any of the Bank's records at the time the FDIC purchased the Lombard loan documents. In any event, the FDIC denies having any knowledge of either document's existence before the commencement of this suit.

Mr. Hughes indicates that the FDIC negotiated with him throughout the fall of 1985 in an attempt to work out an agreement for repayment of the two loans. The parties apparently did not reach a resolution. In May 1986, the FDIC notified the Hugheses that they had defaulted on both the Cathedral Court and

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Lombard loans and commenced this mortgage foreclosure and deficiency action.

The FDIC has moved for summary judgment on its action for foreclosure of the Cathedral Court and Lombard mortgages pursuant to Minn. Stat. §§581.03, 581.09 and 582.30 (1986). Defendants move for partial summary judgment dismissing the FDIC's foreclosure action on the Lombard property.

DISCUSSION

Rule 56 of the Federal Rules on Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of

law." Once a properly supported motion for summary judgment has been made, the burden is on the nonmoving party to produce some evidence demonstrating the existence of a factual dispute. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions, designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The nonmoving party must produce enough evidence that a reasonable jury could return a verdict for the nonmoving party. Anderson, 106 S.Ct. at 2510.

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I. Cathedral Court Mortgage

To support this motion, the FDIC has submitted pleadings, affidavits and Bank documents indicating the existence of the mortgage, note and guaranty, and the failure of the Hugheses to make the appropriate payments on that loan. The Hugheses have admitted the execution of these obligations and the default in payment.

In response to the FDIC's motion, defendants raise three issues which, in their opinion, render summary judgment inappropriate. First, the Bank and its assignee, the FDIC, allegedly breached an agreement with the Hugheses to refinance the Lombard loans. Second, the defendants feel that the FDIC has taken inconsistent factual positions regarding the rescission letter and the interest

due on the loans, thereby raising a genuine issue of material fact. Finally, Mr. Hughes asserts that he agreed to turn over the deeds of the three condominiums to the FDIC as a settlement on the Cathedral Court loan, and as a result, he is no longer liable for the Cathedral Court Mortgage. Because the burden of producing evidence of a factual dispute rests with defendants, the Court must examine each issue to determine if they have designated specific facts which present a genuine issue for trial.

A. Letter Agreement of June 1, 1982

Defendants allege that foreclosure on the Cathedral Court Mortgage is inappropriate because the Bank and its assignee, the FDIC, breached a letter agreement between the Bank and Mr. Hughes by failing to arrange a refinancing of

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the loans. Apparently, defendants feel that their reliance on the refinancing agreement led them to sign the loan documents, and because the FDIC failed to change the terms of the Lombard loan, the defendants are somehow relieved of liability under the notes and mortgages.

The FDIC responds that, assuming a refinancing agreement existed, it would be unenforceable against the FDIC, as a matter of law, because under 12 U.S.C.

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§1823(e),[1] such a side agreement cannot diminish the FDIC's interest in an asset, unless that agreement is in writing, is executed at the same time as the loan document, and is approved by the Bank's board of directors. Defendants request this Court to deny FDIC's motion for

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[1] 12 U.S.C. §1823 (3) provides:

No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

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summary judgment so that they may complete discovery to determine if the requirements of §1823(e) were met. If the agreement is unenforceable against the FDIC as a matter of law, the Court need not determine the effect that a breach might have on the notes and mortgages.

To support their contention that an agreement exists, defendants point to a letter which Mr. Hughes drafted and which Harry Jensen signed. This letter does include a reference to a refinancing arrangement, which was to occur after the home improvements on the Lombard residence were completed. The record indicates, however, that the time for discovery ended on December 1, 1987. Since that time, the defendants have not shown this Court any evidence supporting

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their claim that the letter agreement meets the statutory requirements of §1823(e). The FDIC states that the Bank did not have the June letter agreement in its official records and that the minutes of its board meetings do not reflect an approval of this agreement. (Affidavit of Stephen Kunde at pars. 11 and 12 (June 25, 1987)). Because the defendants have not presented any evidence to the contrary, this Court must conclude that the letter agreement of June 1, 1982 does not meet the requirements of §1823(e) and is, therefore, unenforceable against the FDIC.

B. Inconsistent Factual positions

Defendants urge this Court to deny summary judgment because the FDIC has taken inconsistent positions with regard to the receipt and validity of Mr.

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Hughes' notice of rescission of the Lombard loan and to the amount of interest payments Mr. Hughes has made on the Cathedral Court loan.

First, even if the rescission letter presents an issue of fact, this letter does not affect the Cathedral Court Mortgage. The notice of rescission clearly applied only to the $100,000 Lombard loan. (See plaintiff's Exhibit A.) The letter reads in pertinent part: "I hereby rescind and cancel the $100,000.00 construction loan dated June 18, 1982 made by the Bank to Francis R. Hughes and Bernadette J. Hughes for work on our home at 1030 Lombard Avenue, Saint Paul, Mn." The rescission letter never mentions the Cathedral Court Mortgage, and, therefore, does not raise any factual issues with regard to the

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Cathedral Court Mortgage.

Second, although the FDIC never directly disputes that the Bank received this letter, it does dispute the validity of the rescission under the Truth-in-Lending Act ("TILA"), 15 U.S.C. §1601 et. seq.. The FDIC contends that, without the signature of Mrs. Hughes, and without a contemporaneous tender of loan proceeds from Mr. Hughes, the rescission letter is invalid. The signature and tender issues, however, are legal in nature, not factual, and constitute an insufficient basis for denial of the FDIC' s motion for summary judgment on the Cathedral Court Mortgage.[2]

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[2] The validity of the rescission will be taken up in the discussion of the Lombard Mortgage.

Finally, defendants assert that a dispute exists as to the amount of interest payments the Hughes have made on the Cathedral Court loan. Since the time of oral arguments, however, this factual discrepancy has been resolved.[3] The record before this Court indicates no issue of fact as to the interest payments which could affect the outcome of this case.

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[3] Both the FDIC and defendants agree that, as of September 1987, the Hugheses have made $23,211.15 in interest payments on the Cathedral Court Note, and that the current per diem accrual rate of interest is approximately $92.47. (See Affidavit of Francis R. Hughes at par. 3 (Sept. 1, 1987), and Affidavit of Karen Park Gallivan, Exhibit A (Schedule of Principal and Interest Due) (Sept. 17, 1987)). Similarly, both parties agree that no principal payments have been made on the loan. (Defendants' Response to Plaintiff's Requests for Admissions at par. 19 (April 3, 1987)).

C. Settlement Offer

Lastly, defendants request further time to determine the merits of their claim that the FDIC and Mr. Hughes negotiated a settlement of the Cathedral Court loan dispute. Mr. Hughes relies on the language of a letter that he sent to the FDIC on October 8, 1985 to support the contention that he agreed to deed over the property in return for the FDIC's promise to forego mortgage foreclosure. (Affidavit of Francis R. Hughes, Defendants' Exhibit D (Sept. 1, 1987)). This letter constitutes the only evidence of any alleged agreement to resolve the Cathedral Court dispute.

Although discovery in this case ended December 1, 1987, the defendants have provided no evidence that the FDIC entered into any settlement negotiations,

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that the FDIC intended any such discussions to constitute an offer, or that Mr. Hughes' letter accepts that which was allegedly offered. Even if Mr. Hughes' alleged willingness "to sign the necessary papers to deed the property over" constitutes an acceptance, it appears that any offer had been withdrawn before Mr. Hughes sent his October 8, 1985 letter since the FDIC had requested action before September 24, 1987. Mr. Hughes failed to meet the two week deadline mentioned in the letter. This Court finds that there is insufficient evidence on which a reasonable jury could base a finding that Mr. Hughes' letter of October 8, 1985 constituted an enforceable contract.

Because the defendants have failed to provide the Court with evidence of

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specific factual issues with regard to the Cathedral Court property, this Court must grant summary judgment in favor of the FDIC allowing foreclosures of the Cathedral Court mortgage.

II. Lombard Loan

The FDIC requests summary judgment on its claim for foreclosure on the Lombard loan. In response, the defendants request summary judgment dismissing FDIC' s "foreclosure action on the Lombard residence because Mr. Hughes effectively rescinded the Lombard Mortgage as allowed under the Truth-In-Lending Act and thereby voided FDIC's security interest in the residence. Further, he asserts that the Bank and its assignee, the FDIC, breached its June 1982 letter agreement to refinance the Lombard loan. Finally, he alleges that

because the Lombard residence is homesteaded property, foreclosure must be stayed for six months under Minn. Stat. §583.04 (1986).

A. Rescission: Truth-In-Lending Act

Defendants' affirmative defense and counterclaim of rescission rest on the applicability of the TILA, both as to this particular loan with the Bank and as against the FDIC as assignee of the debt, and the validity of the rescission under the TILA.

2. Applicability of TILA Against the FDIC

The defendants request this Court to enforce their right to rescind a consumer loan under 15 U.S.C. §1635,[4] and to assess damages for the Bank's failure to make the mandatory disclosures under

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[4] Section 1635 provides in pertinent part:

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction...in which a security interest...is or will be retained or acquired in any property which is used as the principle dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction....

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor...becomes void upon such a rescission.

[5] Section §1640 creates a private cause of action against a non-complying creditor and provides for damages of twice the amount of any finance charge in (continued...)

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§1640.[5] The FDIC asserts that the entire TILA is inapplicable to the FDIC because 15 U.S.C. §1612(b) creates a statutory exemption for governmental agencies.[6] That section provides:

> (b) No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any department or agency

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[5] (...continued) connection with the action, not to exceed $1,000. The rule in the Eight Circuit is that each obligor in an individual consumer credit transaction may collect statutory damages up to $1,000. Anderson v. Farmers Bank of Clatonia, 640 F.2d 1347, 1349 (8th Cir. 1981); Dougherty v. Hoolihan, Neils and Boland, Ltd., 531 F. Supp. 717, 722 (D. Minn. 1982). Where §1640 liabiity is enforced, the creditor is also liable for the costs of the action and reasonable attorney fees. 15 U.S.C. §1640(a)(3); Dougherty, 531 F. Supp. at 723.

[6] The FDIC, acting in its corporate capacity, is an agency of the federal government. See 12 U.S.C. §1819; 12 U.S.C. §1827; FDIC v. Webb, 464 F. Supp. 520, 525 (E.D. Tenn. 1978); Freeling v. FDIC, 221 F. Supp. 955, 956, aff'd, 326 F.2d 971 (10th Cir. 1963).

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thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision.

15 U.S.C. §1612(b).

Because §1612(b) clearly constitutes a statutory exemption, this Court cannot impose civil or criminal sanctions against the FDIC. The question then becomes whether rescission pursuant to §1635 and civil damages under §1640 constitute a civil penalty.

The §1640 damages clearly constitute a civil penalty within the meaning of §1612(b). First, the section, by its own terms, calls for the imposition of "civil liability" on any creditor who fails to comply with the disclosure requirements of the Act. The unambiguous language of §1640 presents a set of civil penalties. Second, the legislative history of the Act indicates that "civil and criminal

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penalty" refers to §1611 (criminal liability) and §1640 (civil liability). H. Rep. No. 1040, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1962, 1976 and 1988. Finally, courts have held that §1640 provides for a civil penalty. See e.g., Williams v. Public Finance Corp., 598 F.2d 349, 356 (5th Cir. 1979). Based on the language of the statute, its legislative history and judicial law interpreting §1640, this Court finds that Congress intended governmental agencies, such as the FDIC, to be exempt from TILA

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claims for §1640 civil damages.[7]

The loss of finance charges and security interest in the Lombard property which result from a §1635 rescission are not as easily categorized as civil penalties. The Fifth Circuit, in James v. Home Construction Company of Mobile, Inc., 621 F.2d 727 (5th Cir. 1980), analyzed §1635 and the declaration of the TILA's purpose in §1601 to find that this provision does not constitute a penal sanction. James, 621 F.2d at 730. Although the facts of James are

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[7] The FDIC asserts that this Court lacks subject matter jurisdiction to impose §1640 damages if that action is brought more than one year after the TILA violation. Because the Hugheses' claim for §1640 damages cannot be enforced against the FDIC, this Court need not determine whether §1640(e) constitutes a grant of subject matter jurisdiction.

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distinguishable from the present case,[8] the court's reasoning provides insight into the nature of §1635. The court examined three factors (1) whether the purpose of the action was to redress individual wrongs or wrongs to the public; (2) whether the recovery ran to the individual or to the public; and (3) whether the recovery was disproportionate to the harm suffered. Id. (citing Murphy v. Household Finance Corp., 560 F.2d 206, 209 (6th Cir. 1977) and Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 228, 36 L.Ed.2d 1123 (1892)).

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[8] In James the plaintiff sought to enforce his deceased mother's right to rescind a consumer loan pursuant to §1635. The Court examined the nature of section 1635 under the TILA to determine if it constituted a penalty because, traditionally, actions for penalties do not survive the death of the plaintiff. James, 621 F.2d at 730.

The Fifth Circuit held that the purpose of the TILA is to enable the individual consumer to credit shop and avoid the uninformed use of credit, that the recovery under §1635 runs to the individual and that the purpose of the rescission remedy is to restore the parties, as much as possible, to the status quo ante. James, 621 F.2d at 730.

Under this analysis, the right to rescission under §1635 is not a civil penalty and, therefore, is a remedy outside of the scope of § 1612(b). This conclusion is consistent with the general policy of the Act "to assure a meaningful disclosure of credit terms." 15 U.S.C. §1601(a). There is no public policy reason for disallowing a valid rescission merely because the creditor has become insolvent and has sold the underlying

note and mortgage to a governmental agency. Congress specifically provided in 15 U.S.C. §1641(c):

> Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.

15 U.S.C. §1641(c) (emphasis added). Had Congress intended for governmental agencies such as the FDIC to be immune from the effects of this provision, it could have indicated that §1641(c) is limited by §1612(b). No such reference to §1612(b) exists. The right of rescission, if validly invoked, is not a civil penalty and can be enforced against the FDIC.

The FDIC points to Federal Deposit Insurance Corp. v. Webb, 464 F.Supp. 520 (E.D. Tenn. 1978) for the proposition that any TILA claim is inapplicable to

the FDIC. In Webb, the FDIC purchased three promissory notes from an insolvent Bank, after which it sued defendant Webb on those notes. Webb asserted, as an affirmative defense, that the Bank had violated the TILA. The District Court for the Eastern District of Tennessee held that a TILA violation does not discharge the underlying liability on the notes and that the FDIC is not subject to any TILA claims resulting from the Bank's violations of the Act. Webb, 464 F.Supp. at 525. The Webb court, however, did not specifically address the rescission issue. It did recognize that a TILA violation cannot affect a debtor's obligation to pay off a debt. Allowing a rescission claim against the FDIC is not inconsistent with this holding because rescission merely relieves the

consumer of the duty to pay interest and releases the mortgage on a dwelling. It does not affect the underlying debt. This Court, therefore, holds that Webb does not directly address the rescission claim, and that §1635 of the TILA may be enforced against the FDIC.

2. Applicability of TILA To This Transaction

The FDIC further asserts that the TILA is inapplicable to the Lombard transaction because Mr. Hughes used the $100,000 for business purposes. The disclosure requirements of the Act, which obligate creditors to provide consumers with information regarding the various credit terms available, apply only to consumer credit transactions "in which the party whom credit is offered or extended is a natural person, and the

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money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. §1602(h). The TILA does not apply to:

> (1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.

15 U.S.C. §1603(1).

To determine the applicability of the TILA, this Court must "examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether - this transaction was primarily consumer or commercial in nature." Tower v. Moss, 625 F.2d 1161, 1166 (5th Cir. 1980). Although the nature of the transaction could present a factual issue, this Court

finds that the FDIC has failed to provide any evidence, other than speculation, that the Lombard loan was used for commercial purposes. "In such a situation, there can be 'no genuine issue as to any material fact' ...." Celotex Corp., 106 S.Ct. at 2553.

First, the Lombard Note and Security Agreement indicate that the purpose of the loan was for "home improvements". (Plaintiff's Exhibit E). When, as in the present case, a creditor extends credit for home improvements, that loan constitutes a consumer transaction within the meaning of the Truth-In-Lending Act. See Gerasta v. Hibernia National Bank, 575 F.2d 580, 582 (5th Cir. 1978) (home improvement loan constitutes consumer transaction within meaning of TILA). The designation in the Lombard loan gave the

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Bank and the FDIC notice that the Hugheses intended to use the proceeds for personal or household purposes.

Second, Mr. Hughes' letter of June 1, 1982 specifies that the Bank agreed to lend the Hugheses $100,000 "for the purpose of improvements to their property at 1030 Lombard Avenue, Saint Paul, Minnesota." (Hughes Memo in Support, Exhibit A). The rescission letter of June 20, 1984 similarly indicates that Mr. Hughes had intended the loan to cover "work on our home at 1030 Lombard Avenue ...." Affidavit of Francis R. Hughes, Exhibit A (Sept. 1, 1987).

Finally, the fact that Mr. Hughes directly deposited the Lombard loan proceeds into the HDCI's Bank account does not prove, as a matter of law, that the loan was commercial. Although the

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Bank may have distributed the proceeds directly to HDCI, there is no evidence indicating that HDCI did not use the money for improvements on the Lombard residence: Mr. Hughes indicates that HDCI used the money to make improvements on the Lombard home. (Affidavit of Francis R. Hughes at Pars. 3-5 (Sept. 9, 1987)). No evidence exists to contradict Mr. Hughes' statement that, at the time the Bank executed the loan documents, the loan to the Hugheses of $100,000 financed improvements on the Hughes residence. Accordingly, the Court has concluded that the Lombard transaction constituted a consumer transaction within the meaning of the Truth-In-Lending Act.

3. Validity of the Rescission

Finally, the FDIC asserts that even if the TILA is applicable against the FDIC

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and to this transaction, the letter of rescission was legally insufficient to rescind the transaction. To determine the validity of Mr. Hughes' letter of rescission, this Court must determine whether this letter satisfies the statutory requirements. Under 12 C.F.R. §226.23, to exercise the right to rescind:

> [T]he consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed . . . .

12 C.F.R. §226.23(a) (2).

The consumer has three days after consummation of the transaction to exercise the right to rescind unless the Bank fails to make certain disclosures, in which case the consumer's right to rescind extends for three years. 12 C.F.R. §226.23 (a) (3).

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Under the TILA, a creditor must provide the debtor with notice of the right to rescind, and disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. 12 C.F.R. §§226.23(a) (3) n.2 and 226.23(b). Mr. Hughes alleges that the Bank did not make all of the required disclosures and the FDIC concedes that these disclosures did not appear in the Bank's files. Mr. Hughes, thus, had the right to rescind the security interest of the loan transaction.

The record shows that Mr. Hughes mailed a letter on June 20, 1984 requesting rescission and cancellation of the Lombard loan. (Affidavit of Francis R. Hughes, Exhibit B (June 30, 1987)): The FDIC does not dispute that Mr. Hughes

mailed this letter, or that Mr. Hughes asserted his right to rescind in a timely manner. Instead, the FDIC asserts that the notice of rescission was ineffective because Mrs. Hughes failed to sign the letter and because Mr. Hughes failed to tender the loan proceeds with the notification of rescission. The FDIC also alleges that even if the rescission fulfills the statutory requirements, it cannot be enforced against the FDIC because the agency is a holder in due course.

First, the absence of Mrs. Hughes' signature does not render the rescission void. Regulation Z provides:

> When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

12 C.F.R. §226.23(a) (4).

The failure of Mrs. Hughes to sign the June 20, 1984 letter is irrelevant in light of this regulation. The rescission of Mr. Hughes is imputed to Mrs. Hughes. See 12 C.F.R. Part 226, Supp. I, par. 23(a) (4) (if both husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission); Etta v. Seaboard Enterprise Inc., 674 F.2d 913, 918 (D.C. Cir. 1982) (rescission by daughter held attributable to mother when property was jointly held).

Second, the FDIC indicates that it was not aware of the rescission letter until April 1987 when it received a copy of the letter in connection with this suit. (Affidavit of Scott McMillan at par. 2

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(Sept. 2, 1987)). Although this Court recognizes that the FDIC may have had no knowledge of the rescission claim when it purchased the loan documents from the Bank, this fact does not protect the FDIC.

The FDIC is correct in asserting that it receives special treatment when a debtor asserts a defense against a note. In Federal Denosit Insurance Corp. v. Wood, 758 F.2d 156 (6th Cir. 1985), cert. denied, 474 U.S. 944, 106 S.Ct. 308 (1985), the Sixth Circuit Court of Appeals stated:

> [W]hen the FDIC in its corporate capacity, as part of a purchase and assumption transaction, acquires a note in good faith, for value, and without actual knowledge of any defenses against the note, it takes the note free of all defenses that would not prevail against a holder in due course.

FDIC v. Wood, 758 F.2d at 161.

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FDIC v. Armstrong, 784 F.2d 741, 745 (6th Cir. 1986). The Hugheses, however, do not raise a defense against the Lombard Note. Their rescission claim merely affects the FDIC's security interest.

The statutory language of both §1641(a) and §1641(c) indicates that the rescission claim may be asserted against any assignee. Under §1641(a), a debtor may sue for a TILA violation if the violation is apparent from the assigned documents. The FDIC does not contest the fact that the Hugheses received none of the required disclosures. Similarly, under §1641(c), a consumer may rescind a transaction as against any assignee. Thus, when the FDIC purchases assets secured by mortgages on principal dwellings and the insolvent bank fails to provide the required disclosures, the

FDIC remains subject to the consumer's right to rescind.

Finally, §1635 does not allow creditors to force a debtor to tender loan proceeds when that debtor rescinds a consumer loan. The language of the statute and case law indicate that an obligor need not tender the loan proceeds until the creditor has released the security interest. Section 1635(b) provides in pertinent part:

> Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section. The obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value.

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15 U.S.C. §1635(b) (emphasis added).

The statute clearly provides that the obligor is required to return property received from the creditor only after the creditor releases the security interest. Dougherty, 531 F. Supp. at 722; Powers v. Sims and Levin, 542 F.2d 1216, 1221 (4th Cir. 1976); Gerasta, 575 F.2d at 584; Palmer v. Wilson, 502 F.2d 860, 862 (9th Cir. 1974).

It has, however, been recognized that rescission under the TILA is an equitable remedy. The purpose of rescission is to return the parties to the position they occupied prior to the transaction. Therefore, courts may condition rescission on the return of property or money to the creditor. Dougherty, 531 F. Supp. at 722; Powers, 542 F.2d at 1221; Palmer, 502 F.2d at

862. Although the Hugheses concede that they are liable for the $100,000 principal, the Court is concerned that the Hugheses' apparently weak financial position will prevent them from repaying the principal. Therefore, to protect the right of the FDIC to return of the principal, rescission will be conditioned upon Hugheses tendering the amount advanced. See LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976) (rescission conditioned upon repayment of the principal because debtor had declared bankruptcy).

This Court has determined that the rescission letter of June 20, 1984 constituted a valid rescission of the Lombard loan. The FDIC must therefore release the security interest on that property after the Hugheses tender the

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$100,000 to the FDIC. At that time, the Hugheses should receive credit for the interest paid and the FDIC should receive credit for the delinquent real estate taxes it paid on the Lombard property.

B. Minnesota Mortgage Moratorium Act

This Court need not determine whether the Hugheses have properly requested a six-month stay of foreclosure under Minn. Stat. §583.04. Because the Lombard Mortgage is void as a result of the rescission letter of June 20, 1984, the FDIC cannot foreclose on the Lombard property.

Accordingly, IT IS BEREBY ORDERED that:

1. Plaintiff's motion for summary judgment as to the Cathedral Court Mortgage is granted. Judgment shall be entered for $300,000 plus any unpaid

interest against defendants. Pursuant to Minn. Stat. §581.03 this Court orders foreclosure of the Cathedral Court condominium units to satisfy the debt. The defendants shall also pay to the FDIC the $8,324.07 of real estate taxes which the governmental agency paid on the Cathedral Court property. The Court also awards to the FDIC its attorney fees as agreed in the Cathedral Court Mortgage. In the event the foreclosure sale fails to fully satisfy this amount, the FDIC may obtain a deficiency judgment against the defendants. Minn. Stat. §582.30 (1) (a) (2);

2. Plaintiff's motion for summary judgment as to the Lombard Mortgage is denied;

3. Defendants' motion for summary judgment as to the Lombard Mortgage is

granted in part. Defendants shall tender the $100,000 principal under the Lombard Note to the FDIC, at which time the rescission will be effective and the FDIC will release its security interest. The Hugheses shall receive credit for interest paid and the FDIC shall receive credit for the $4,686.23 paid for delinquent real estate taxes on the Lombard property.

Dated: March 18, 1988

David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-223

Federal Deposit Insurance Corporation in its corporate capacity,

Plaintiff,

v.

Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes,

Defendants.

ORDER

Karen Park Gallivan, Esq. and Rider, Bennett, Egan & Arundel, 2500 First Bank Place West, Minneapolis, MN 55402 for plaintiff.

Ann K. Newhall, Esq., Dale M. Wagner, Esq. and Moss & Barnett, 1200 Pillsbury Center, Minneapolis, MN 55402 for defendants.

Plaintiff has requested a clarification of this Court's Order dated March 18, 1988. To facilitate clarification of that Order, the Court

will vacate the March 18, 1988 Order and substitute the Order dated April 12, 1988. The substituted Order contains only slight modifications and is not intended to alter the judgment but only to clarify the Court's intent with regard to the March 18, 1988 Order.

Dated: April 12, 1988

David S. Doty, Judge
United States District Court

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-223

Federal Deposit Insurance Corporation, in its corporate capacity,

Plaintiff,

v.

Hughes Development Company Inc., Francis R. Hughes, and Bernadette J. Hughes,

Defendants.

Karen Park Gallivan, Esq. and Rider, Bennett, Egan & Arundel, 2500 First Bank Place West, Minneapolis, MN 55402 for plaintiff.

Ann K. Newhall, Esq., Dale M. Wagner, Esq. and Moss & Barnett, 1200 Pillsbury Center, Minneapolis, MN 55402 for defendants.

ORDER

This case comes before the Court on a motion for summary judgment by plaintiff Federal Deposit Insurance Corporation ("FDIC") and a cross motion for partial summary judgment by the defendants Hughes

Development Company, Inc. ("HDCI") Francis R. Hughes ("Mr. Hughes"), and Bernadette J. Hughes ("Mrs. Hughes").

FACTUAL BACKGROUND

In 1982, Mr. Hughes and Guaranty State Bank of St. Paul ("Bank") executed a Combination Note, Security Agreement and Disclosure ("Cathedral Court Note") in the amount of $300,000 on behalf of HDIC. Mr. Hughes intended to use the proceeds to remodel three commercial condominium units located in the Cathedral Court complex developed by HDCI and owned by the Hugheses. To secure the note, Mr. and Mrs. Hughes signed a Security Agreement and Mortgage Deed ("Cathedral Court Mortgage"), granting a mortgage interest to the Bank in the three condominium units. Mr. and Mrs. Hughes also signed a Guaranty which provided

that the couple would promptly pay any existing and future indebtedness from HDCI to the Bank.

On the same day, Mr. and Mrs. Hughes signed a Combination Note, Security Agreement and Disclosure in the amount of $100,000 ("Lombard Note"), the loan proceeds from which were to be used to remodel the family residence on Lombard Avenue, St. Paul, Minnesota. Mr. Hughes alleges that, before he and the Bank signed the loan documents, the Bank agreed to refinance the Lombard loan after completion of the home improvements. The terms of this agreement appear in a letter signed by both Mr. Hughes and Harry Jensen, the Bank's president.

In 1984, the FDIC. was appointed receiver of the Bank's property and

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business after the Bank was adjudged insolvent. The FDIC, in its corporate capacity, purchased the Cathedral Court Note, the Cathedral Court Mortgage, the Lombard Note, and the Lombard Mortgage from the Bank. After purchasing these assets from the Bank, the FDIC discovered that the defendants had defaulted in their payments, and that the Hugheses had been delinquent in the payment of real estate taxes. The FDIC paid $8,324.07 in delinquent Cathedral Court property taxes, and $4,686.23 in delinquent real estate taxes for the Lombard property.

Approximately one month before the Bank was adjudged insolvent, Mr. Hughes allegedly sent a letter to the Bank ("rescission letter") notifying its officials that they had failed to make certain disclosures on the Lombard loan,

as required by the Truth-In-Lending Act. He stated in this letter that he wished to rescind and cancel the Lombard loan agreement. Apparently, neither this letter of rescission nor the letter agreement on refinancing appeared in any of the Bank's records at the time the FDIC purchased the Lombard loan documents. In any event, the FDIC denies having any knowledge of either document's existence before the commencement of this suit.

Mr. Hughes indicates that the FDIC negotiated with him throughout the fall of 1985 in an attempt to work out an agreement for repayment of the two loans. The parties apparently did not reach a resolution. In May 1986, the FDIC notified the Hugheses that they had defaulted on both the Cathedral Court and

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Lombard loans and commenced this mortgage foreclosure and deficiency action.

The FDIC has moved for summary judgment on its action for foreclosure of the Cathedral Court and Lombard mortgages pursuant to Minn. Stat. §§581.03, 581.09 and 582.30 (1986). Defendants move for partial summary judgment dismissing the FDIC's foreclosure action on the Lombard property.

DISCUSSION

Rule 56 of the Federal Rules on Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to the interrogatorles, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of

law." Once a properly supported motion for summary judgment has been made, the burden is on the nonmoving party to produce some evidence demonstrating the existence of a factual dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions, designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The nonmoving party must produce enough evidence that a reasonable jury could return a verdict for the nonmoving party. Anderson, 106 S.Ct. at 2510.

I. Cathedral Court Mortgage

To support this motion, the FDIC has submitted pleadings, affidavits and Bank documents indicating the existence of the mortgage, note and guaranty, and the failure of the Hugheses to make the appropriate payments on that loan. The Hugheses have admitted the execution of these obligations and the default in payment.

In response to the FDIC's motion, defendants raise three issues which, in their opinion, render summary judgment inappropriate. First, the Bank and its assignee, the FDIC, allegedly breached an agreement with the Hugheses to refinance the Lombard loans. Second, the defendants feel that the FDIC has taken inconsistent factual positions regarding the rescission letter and the interest

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due on the loans, thereby raising a genuine issue of material fact. Finally, Mr. Hughes asserts that he agreed to turn over the deeds of the three condominiums to the FDIC as a settlement on the Cathedral Court loan, and as a result, he is no longer liable for the Cathedral Court Mortgage. Because the burden of producing evidence of a factual dispute rests with defendants, the Court must examine each issue to determine if they have designated specific facts which present a genuine issue for trial.

A. Letter Agreement of June 1, 1982

Defendants allege that foreclosure on the Cathedral Court Mortgage is inappropriate because the Bank and its assignee, the FDIC, breached a letter agreement between the Bank and Mr. Hughes by failing to arrange a refinancing of

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the loans. Apparently, defendants feel that their reliance on the refinancing agreement led them to sign the loan documents, and because the FDIC failed to change the terms of the Lombard loan, the defendants are somehow relieved of liability under the notes and mortgages.

The FDIC responds that, assuming a refinancing agreement existed, it would be unenforceable against the FDIC, as a matter of law, because under 12 U.S.C.

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§1823(e),[1] such a side agreement cannot diminish the FDIC's interest in an asset, unless that agreement is in writing, is executed at the same time as the loan document, and is approved by the Bank's board of directors. Defendants request this Court to deny FDIC's motion for summary judgment so that they may complete discovery to determine if the

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[1] 12 U.S.C. §1823(e) provides: No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

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requirements of §1823(e) were met. If the agreement is unenforceable against the FDIC as a matter of law, the Court need not determine the effect that a breach might have on the notes and mortgages.

To support their contention that an agreement exists, defendants point to a letter which Mr. Hughes drafted and which Harry Jensen signed. This letter does include a reference to a refinancing arrangement, which was to occur after the home improvements on the Lombard residence were completed. The record indicates, however, that the time for discovery ended on December 1, 1987. Since that time, the defendants have not shown this Court any evidence supporting their claim that the letter agreement meets the statutory requirements of

§1823(e). The FDIC states that the Bank did not have the June letter agreement in its official records and that the minutes of its board meetings do not reflect an approval of this agreement. (Affidavit of Stephen Kunde at pars. 11 and 12 (June 25, 1987)). Because the defendants have not presented any evidence to the contrary, this Court must conclude that the letter agreement of June 1, 1982 does not meet the requirements of §1823(e) and is, therefore, unenforceable against the FDIC.

B. Inconsistent Factual Positions

Defendants urge this Court to deny summary judgment because the FDIC has taken inconsistent positions with regard to the receipt and validity of Mr. Hughes' notice of rescission of the Lombard loan and to the amount of

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interest payments Mr. Hughes has made on the Cathedral Court loan.

First, even if the rescission letter presents an issue of fact, this letter does not affect the Cathedral Court Mortgage. The notice of rescission clearly applied only to the $100,000 Lombard loan. (See Plaintiff's Exhibit A.) The letter reads in pertinent part: "I hereby rescind and cancel the $100,000.00 construction loan dated June 18, 1982 made by the Bank to Francis R. Hughes and Bernadette J. Hughes for work on our home at 1030 Lombard Avenue, Saint Paul, Mn." The rescission letter never mentions the Cathedral Court Mortgage, and, therefore, does not raise any factual issues with regard to the Cathedral Court Mortgage.

Second, although the FDIC never

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directly disputes that the Bank received this letter, it does dispute the validity of the rescission under the Truth-in-Lending Act ("TILA"), 15 U.S.C. §1601 et seq. The FDIC contends that, without the signature of Mrs. Hughes, and without a contemporaneous tender of loan proceeds from Mr. Hughes, the rescission letter is invalid. The signature and tender issues, however, are legal in nature, not factual, and constitute an insuff icient basis for denial of the FDIC s motion for summary judgment on the Cathedral Court Mortgage.[2]

Finally, defendants assert that a dispute exists as to the amount of interest payments the Hughes have made on

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[2] The validity of the rescission will be taken up in the discussion of the Lombard mortgage.

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the Cathedral Court loan. Since the time of oral arguments, however, this factual discrepancy has been resolved.[3] The record before this Court indicates no issue of fact as to the interest payments which could affect the outcome of this case.

C. Settlement Offer

Lastly, defendants request further time to determine the merits of their claim that the FDIC and Mr. Hughes negotiated

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[3] Both the FDIC and defendants agree that, as of September 1987, the Hugheses have made $23,211.15 in interest payments on the Cathedral Court Note, and that the current per diem accrual rate of interest is approximately $92.47. (See Affidavit of Francis R. Hughes at par. 3 (Sept. 1, 1987), and Affidavit of Karen Park Gallivan, Exhibit A. (Schedule of Principal and Interest Due) (Sept. 17, 1987)). Similarly, both parties agree that no principal payments have been made on the loan. (Defendants' Response to Plaintiff's Requests for Admissions at par. 19 (April 3, 1987)).

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a settlement of the Cathedral Court loan dispute. Mr. Hughes relies on the language of a letter that he sent to the FDIC on October 8, 1985 to support the contention that he agreed to deed over the property in return for the FDIC's promise to forego mortgage foreclosure. (Affidavit of Francis R. Hughes, Defendants' Exhibit D (Sept. 1, 1987)). This letter constitutes the only evidence of any alleged agreement to resolve the Cathedral Court dispute.

Although discovery in this case ended December 1, 1987, the defendants have provided no evidence that the FDIC entered into any settlement negotiations, that the FDIC intended any such discussions to constitute an offer, or that Mr. Hughes' letter accepts that which was allegedly offered. Even if Mr.

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Hughes' alleged willingness "to sign the necessary papers to deed the property over" constitutes an acceptance, it appears that any offer had been withdrawn before Mr. Hughes sent his October 8, 1985 letter since the FDIC had requested action before September 24, 1987. Mr. Hughes failed to meet the two week deadline mentioned in the letter. This Court finds that there is insufficient evidence on which a reasonable jury could base a finding that Mr. Hughes' letter of October 8, 1985 constituted an enforceable contract.

Because the defendants have failed to provide the Court with evidence of specific factual issues with regard to the Cathedral Court property; this Court must grant summary judgment in favor of the FDIC allowing foreclosures of the

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Cathedral Court mortgage.

II. Lombard Loan

The FDIC requests summary judgment on its claim for foreclosure on the Lombard loan. In response, the defendants request summary judgment dismissing FDIC's foreclosure action on the Lombard residence because Mr. Hughes effectively rescinded the Lombard Mortgage as allowed under the Truth-In-Lending Act and thereby voided FDIC'S security interest in the residence. Further, he asserts that the Bank and its assignee, the FDIC, breached its June 1982 letter agreement to refinance the Lombard loan. Finally, he alleges that because the Lombard residence is homesteaded property, foreclosure must be stayed for six months under Minn. Stat. §583.04 (1986).

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A. Rescission: Truth-In-Lending Act

Defendants' affirmative defense and counterclaim of rescission rest on the applicability of the TILA, both as to this particular loan with the Bank and as against the FDIC as assignee of the debt, and the validity of the rescission under the TILA.

1. Applicability of TILA against the FDIC

The defendants request this Court to enforce their right to rescind a consumer

loan under 15 U.S.C. §1635,[4] and to assess damages for the Bank's failure to make the mandatory disclosures under

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[4] Section 1635 provides in pertinent part: (a) Except as otherwise provided in this section, in the case of any consumer credit transaction...in which a security interest...is or will be retained or acquired in any property which is used as the principle dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction....(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor...becomes void upon such a rescission.

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§1640.[5]5 The FDIC asserts that the entire TILA is inapplicable to the FDIC because 15 U.S.C. §1612(b) creates a statutory exemption for governmental agencies.[6] That section provides:

(b) No civil or criminal penalty provided under this subchapter for any

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[5] Section §1640 creates a private cause of action against a non-complying creditor and provides for damages of twice the amount of any finance charge in connection with the action, not to exceed $1,000. The rule in the Eight Circuit is that each obligor in an individual consumer credit transaction may collect statutory damages up to $1,000. Anderson v. Farmers Bank of Clatonia, 640 F.2d 1347, 1349 (8th Cir. 1981); Dougherty v. Hoolihan, Neils and Boland, Ltd., 531 F. Supp. 717, 722 (D. Minn. 1982). Where §1640 liability is enforced, the creditor is also liable for the costs of the action and reasonable attorney fees. 15 U.S.C. §1640(a)(3); Dougherty, 531 F. Supp. at 723.

[6] The FDIC, acting in its corporate capacity, is an agency of the federal government. See 12 U.S.C. §1819; 12 U.S.C. §1827; FDIC v. Webb, 464 F. Supp. 520, 525 (E.D. Tenn. 1978); Freeling v. FDIC, 221 F. Supp. 955, 956, aff'd, 326 F.2d 971 (10th Cir. 1963).

violation thereof may be imposed upon the United States or any department or agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision.

15 U.S.C. §1612(b).

Because §1612(b) clearly constitutes a statutory exemption, this Court cannot impose civil or criminal sanctions against the FDIC. The question then becomes whether rescission pursuant to §1635 and civil damages under §1640 constitute a civil penalty.

The §1640 damages clearly constitute a civil penalty within the meaning of §1612(b). First, the section, by its own terms, calls for the imposition of "civil liability" on any creditor who fails to comply with the disclosure requirements of the Act. The unambiguous language of §1640 presents a set of civil penalties. Second, the legislative history of the

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Act indicates that "civil and criminal penalty" refers to §1611 (criminal liability) and §1640 (civil liability). H. Rep. No. 1040, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1962, 1976 and 1988. Finally, courts have held that §1640 provides for a civil penalty. See e.g., Williams v. Public Finance Corp., 598 F.2d 349, 356 (5th Cir. 1979). Based on the language of the statute, its legislative history and judicial law interpreting §1640, this Court finds that Congress intended governmental agencies,

such as the FDIC, to be exempt from TILA claims for §1640 civil damages.[7]

The loss of finance charges and security interest in the Lombard property which result from a §1635 rescission are not as easily categorized as civil penalties. The Fifth Circuit, in James v. Home Construction Company of Mobile, Inc., 621 F.2d 727 (5th Cir. 1980), analyzed §1635 and the declaration of the TILA's purpose in §1601 to find that this provision does not constitute a penal sanction. James, 621 F.2d at 730. Although the facts of James are

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[7] The FDIC asserts that this Court lacks subject matter jurisdiction to impose §1640 damages if that action is brought more than one year after the TILA violation. Because the Hugheses' claim for §1640 damages cannot be enforced against the FDIC, this Court need not determine whether §1640(e) constitutes a grant of subject matter jurisdiction.

distinguishable from the present case,[8] the court's reasoning provides insight into the nature of §1635. The court examined three factors (1) whether the purpose of the action was to redress individual wrongs or wrongs to the public; (2) whether the recovery ran to the individual or to the public; and (3) whether the recovery was disproportionate to the harm suffered. Id. (citing Murphy v. Household Finance Corp., 560 F.2d 206, 209 (6th Cir. 1977) and Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 228, 36 L.Ed.2d 1123 (1892)).

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[8] In James the plaintiff sought to enforce his deceased mother's right to rescind a consumer loan pursuant to §1635. The Court examined the nature of section 1635 under the TILA to determine if it constituted a penalty because, traditionally, actions for penalties do not survive the death of the plaintiff. James, 621 F.2d at 730.

The Fifth Circuit held that the purpose of the TILA is to enable the individual consumer to credit shop and avoid the uninformed use of credit, that the recovery under §1635 runs to the individual and that the purpose of the rescission remedy is to restore the parties, as much as possible, to the status quo ante. James, 621 F.2d at 730.

Under this analysis, the right to rescission under §1635 is not a civil penalty and, therefore, is a remedy outside of the scope of §1612(b). This conclusion is consistent with the general policy of the Act "to assure a meaningful disclosure of credit terms." 15 U.S.C. §1601(a). There is no public policy reason for disallowing a valid rescission merely because the creditor has become insolvent and has sold the underlying

note and mortgage to a governmental agency. Congress specifically provided in 15 U.S.C. §1641(c):

> Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against assignee of the obligation. 15 U.S.C. §1641(c) (emphasis added).

Had Congress intended for governmental agencies such as the FDIC to be immune from the effects of this provision, it could have indicated that §1641(c) is limited by §1612(b). No such reference to §1612(b) exists. The right of rescission, if validly invoked, is not a civil penalty and can be enforced against the FDIC.

The FDIC points to Federal Deposit Insurance Corp. v. Webb, 464 F.Supp. 520 (E.D. Tenn. 1978) for the proposition that any TILA claim is inapplicable to the FDIC. In Webb, the FDIC purchased

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three promissory notes from an insolvent Bank, after which it sued defendant Webb on those notes. Webb asserted, as an affirmative defense, that the Bank had violated the TILA. The District Court for the Eastern District of Tennessee held that a TILA violation does not discharge the underlying liability on the notes and that the FDIC is not subject to any TILA claims resulting from the Bank's violations of the Act. Webb, 464 F.Supp. at 525. The Webb court, however, did not specifically address the rescission issue. It did recognize that a TILA violation cannot affect a debtor's obligation to pay off a debt. Allowing a rescission claim against the FDIC is not inconsistent with this holding because rescission merely relieves the consumer of the duty to pay interest and

releases the mortgage on a dwelling. It does not affect the underlying debt. This Court, therefore, holds that Webb does not directly address the rescission claim, and that §1635 of the TILA may be enforced against the FDIC.

2. Applicability of TILA To This Transaction

The FDIC further asserts that the TILA is inapplicable to the Lombard transaction because Mr. Hughes used the $100,000 for business purposes. The disclosure requirements of the Act, which obligate creditors to provide consumers with information regarding the various credit terms available, apply only to consumer credit transactions "in which the party whom credit is offered or extended is a natural person, and the money, property, or services which are

the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. §1602(h). The TILA does not apply to:

> (1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.

15 U.S.C. §1603(1).

To determine the applicability of the TILA, this Court must "examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether this transaction was primarily consumer or commercial in nature." Tower v. Moss, 625 F.2d 1161, 1166 (5th Cir. 1980). Although the nature of the transaction could present a factual issue, this Court finds that the FDIC has failed to provide

any evidence, other than speculation, that the Lombard loan was used for commercial purposes. "In such a situation, there can be 'no genuine issue as to any material fact' ...." Celotex Corp., 106 S.Ct. at 2553.

First, the Lombard Note and Security Agreement indicate that the purpose of the loan was for "home improvements". (Plaintiff's Exhibit E). When, as in the present case, a creditor extends credit for home improvements, that loan constitutes a consumer transaction within the meaning of the Truth-In-Lending Act. See Gerasta v. Hibernia National Bank, 575 F.2d 580, 582 (5th Cir. 1978) (home improvement loan constitutes consumer transaction within meaning of TILA). The designation in the Lombard loan gave the Bank and the FDIC notice that the

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Hugheses intended to use the proceeds for personal or household purposes.

Second, Mr. Hughes' letter of June 1, 1982 specifies that the Bank agreed to lend the Hugheses $100,000 "for the purpose of improvements to their property at 1030 Lombard Avenue, Saint Paul, Minnesota." (Hughes' Memo in Support, Exhibit A). The rescission letter of June 20, 1984 similarly indicates that Mr. Hughes had intended the loan to cover "work on our home at 1030 Lombard Avenue ...." Affidavit of Francis R. Hughes, Exhibit A (Sept. 1, 1987).

Finally, the fact that Mr. Hughes directly deposited the Lombard loan proceeds into the HDCI 's Bank account does not prove, as a matter of law, that the loan was commercial. Although the Bank may have distributed the proceeds

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directly to HDCI, there is no evidence indicating that HDCI did not use the money for improvements on the Lombard residence. Mr. Hughes indicates that HDCI used the money to make improvements on the Lombard home. (Affidavit of Francis R. Hughes at Pars. 3-5 (Sept.9, 1987)). No evidence exists to contradict Mr. Hughes' statement that, at the time the Bank executed the loan documents, the loan to the Hugheses of $100,000 financed improvements on the Hughes residence. Accordingly, the Court has concluded that the Lombard transaction constituted a consumer transaction within the meaning of the Truth-In-Lending Act.

3. Validity of the Rescission

Finally, the FDIC asserts that even if the TILA is applicable against the FDIC and to this transaction, the letter

of rescission was legally insufficient to rescind the transaction. To determine the validity of Mr. Hughes' letter of rescission, this Court must determine whether this letter satisfies the statutory requirements. Under 12 C.F.R. §226.23, to exercise the right to rescind:

> [T]he consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed . .

12 C.F.R. §226.23(a) (2).

The consumer has three days after consummation of the transaction to exercise the right to rescind unless the Bank fails to make certain disclosures, in which case the consumer's right to rescind extends for three years. 12 C.F.R. §226.23 (a) (3).

Under the TILA, a creditor must

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provide the debtor with notice of the right to rescind, and disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. 12 C.F.R. §§226.23(a) (3) n.2 and 226.23(b). Mr. Hughes alleges that the Bank did not make all of the required disclosures and the FDIC concedes that these disclosures did not appear in the Bank's files. Mr. Hughes, thus, had the right to rescind the security interest of the loan transaction.

The record shows that Mr. Hughes mailed a letter on June 20, 1984 requesting rescission and cancellation of the Lombard loan. (Affidavit of Francis R. Hughes, Exhibit B (June 30, 1987)). The FDIC does not dispute that Mr. Hughes mailed this letter, or that Mr. Hughes

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asserted his right to rescind in a timely manner. Instead, the FDIC asserts that the notice of rescission was ineffective because Mrs. Hughes failed to sign the letter and because Mr. Hughes failed to tender the loan proceeds with the notification of rescission. The FDIC also alleges that even if the rescission fulfills the statutory requirements, it cannot be enforced against the FDIC because the agency is a holder in due course.

First, the absence of Mrs. Hughes' signature does not render the rescission void. Regulation Z provides:

> When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

12 C.F.R. §226.23 (a) (4).,

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The failure of Mrs. Hughes to sign the June 20, 1984 letter is irrelevant in light of this regulation. The rescission of Mr. Hughes is imputed to Mrs. Hughes. 12 C.F.R. Part 226, Supp. I, par. 23(a)(4) (if both husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission); Etta v. Seaboard Enterprise, Inc., 674 F.2d 913, 918 (D.C. Cir. 1982) (rescission by daughter held attributable to mother when property was jointly held).

Second, the FDIC indicates that it was not aware of the rescission letter until April 1987 when it received a copy of the letter in connection with this suit. (Affidavit of Scott McMillan at par. 2 (Sept. 2, 1987)). Although this

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Court recognizes that the FDIC may have had no knowledge of the rescission claim when it purchased the loan documents from the Bank, this fact does not protect the FDIC.

The FDIC is correct in asserting that it receives special treatment when a debtor asserts a defense against a note. In Federal Deposit Insurance Corp. v. Wood, 758 F.2d 156 (6th Cir. 1985), cert. denied, 474 U.S. 944, 106 S.Ct. 308 (1985), the Sixth Circuit Court of Appeals stated:

> [W]hen the FDIC in its corporate capacity, as part of a purchase and assumption transaction, acquires a note in good faith, for value, and without actual knowledge of any defenses against the note, it takes the note free of all defenses that would not prevail against a holder in due course.

FDIC v. Wood, 758 F.2d at 161. FDIC v. Armstrong, 784 F.2d 741, 745 (6th Cir.

1986). The Hugheses, however, do not raise a defense against the Lombard Note. Their rescission claim merely affects the FDIC's security interest.

The statutory language of both §1641(a) and §1641(c) indicates that the rescission claim may be asserted against any assignee. Under §1641(a), a debtor may sue for a TILA violation if the violation is apparent from the assigned documents. The FDIC does not contest the fact that the Hugheses received none of the required disclosures. Similarly, under §1641 (c), a consumer may rescind a transaction as against any assignee. Thus, when the FDIC purchases assets secured by mortgages on principal dwellings and the insolvent bank fails to provide the required disclosures, the FDIC remains subject to the consumer's

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right to rescind.

Finally, §1635 does not allow creditors to force a debtor to tender loan proceeds when that debtor rescinds a consumer loan. The language of the statute and case law indicate that an obligor need not tender the loan proceeds until the creditor has released the security interest. Section 1635(b) provides in pertinent part:

> Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value.

15 U.S.C. §1635(b) (emphasis added).

The statute clearly provides that the obligor is required to return property received from the creditor only after the creditor releases the security interest. Dougherty, 531 F. Supp. at 722; Powers v. Sims and Levin, 542 F.2d 1216, 1221 (4th cir. 1976): Gerasta, 575 F.2d at 584; Palmer v. Wilson, 502 F.2d 860, 862 (9th Cir. 1974).

It has, however, been recognized that rescission under the TILA is an equitable remedy. The purpose of rescission is to return the parties to the position they occupied prior to the transaction. Therefore, the courts may condition the continuing right of rescission on the return of property or money to the creditor. Dougherty, 531 F. Supp. at 722; Powers, 542 F.2d at 1221;

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Palmer, 502 F.2d at 862. Although the Hugheses concede that they are liable for the $100,000 principal, the court is concerned that the Hugheses' apparently weak financial position will prevent them from repaying the principal. Therefore, to protect the right of the FDIC to return of the principal, the Hugheses' continuing right of rescission will be conditioned upon tender of the amount advanced within a reasonable period. LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976) (rescission conditioned upon repayment of the principal because debtor had declared bankruptcy).

This Court has determined that the rescission letter of June 20, 1984 constituted a valid rescission of the Lombard loan. The FDIC must therefore release the security interest on that

property after the Hugheses tender the $100,000 to the FDIC. Generally, under §1635(b), the debtor must tender the loan proceeds within a reasonable time after the creditor has released any security interest created under the loan transaction. Gerasta v. Hibernia National Bank, 575 F.2d 580, 584 (5th Cir. 1978). In exercising its equitable powers, the Court does not intend to abrogate the debtor's obligation to tender the principal within a reasonable time. Therefore, defendants must tender the principal within one year, receiving credit for the interest paid and with credit to the FDIC for the delinquent real estate taxes it paid on the lombard property.

B. Minnesota Mortgage Moratorium Act

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This Court need not determine whether the Hugheses have properly requested a six-month stay of foreclosure under Minn. Stat. §583.04. Because the Lombard Mortgage is void as a result of the rescission letter of June 20, 1984, the FDIC cannot foreclose on the Lombard property unless the Hugheses fail to tender the $100,000 principal within the time designated.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment as to the Cathedral Court Mortgage is granted. Judgment shall be entered for $300,000 plus any unpaid interest against defendants. Pursuant to Minn. Stat. §581.03 this Court orders foreclosure of the Cathedral Court condominium units to satisfy the debt.

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The defendants shall also pay to the FDIC the $8,324.07 of real estate taxes which the governmental agency paid on the Cathedral Court property. The Court also awards to the FDIC its attorney fees as agreed in the Cathedral Court Mortgage. In the event the foreclosure sale fails to fully satisfy this amount, the FDIC may obtain a deficiency judgment against the defendants. Minn. Stat. §582.30 (1) (a) (2);

2. Plaintiff's motion for summary judgment as to the Lombard Mortgage is denied:

3. Defendants' motion for summary judgment as to the Lombard Mortgage is granted in part. Defendants shall tender the $100,000 principal under the Lombard Note to the FDIC within one year from the date of this Order, at which time the

FDIC will release its security interest. The Hugheses shall receive credit for interest paid and the FDIC shall receive credit for the $4,686.23 paid for delinquent real estate taxes on the Lombard property. Because the Hugheses' continuing right of rescission is conditioned upon their tender of the funds to the FDIC, failure to tender the funds within one year will entitle the FDIC to foreclose on the Lombard loan.

Dated: April 12, 1988

David S. Doty, Judge
United States District Court

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-223

Federal Deposit Insurance Corporation, in its corporate capacity,

Plaintiff,

v.

Hughes Development Company Inc., Francis R. Hughes, and Bernadette J. Hughes,

Defendants.

ORDER

The above matter came before the Honorable David S. Doty, Judge of the above-named court, on July 28, 1989, upon plaintiff's motion for summary judgment.

Based upon all of the files, records and proceedings herein,

IT IS ORDERED AND ADJUDGED:

1. That plaintiff be awarded and recover of defendants Hughes Development Company, Inc., Francis R. Hughes, and

Bernadette J. Hughes, jointly and severally, the sum of One Hundred Thousand Dollars ($100,000.00), principal, plus any unpaid interest, on the Lombard Note, as described in plaintiff's complaint, plus Eleven Thousand One Hundred Four and 19/100 Dollars ($11,104.19) for real estate taxes advanced by plaintiffs for the real property encumbered by the Lombard Mortgage, as described in plaintiff's complaint, plus Eight Hundred Twenty-Six and 50/100 Dollars ($826.50) for attorneys' fees, less Four Thousand Seven Hundred Fourteen and 86/100 Dollars ($,714.86) in interest payments made by defendants, plus an sums expended by plaintiff in payment of real estate taxes, interest, and penalties assessed against the mortgaged premises and paid

by plaintiff prior to foreclosure sale.

2. That the premises encumbered by the Lombard Mortgage, as described in plaintiff's complaint, be sold at foreclosure sale, as provided by law, with the proceeds of such sale, after deducting the costs thereof, applied to payment of the amount adjudged to be due hereunder, along with interest, costs and disbursements, including attorneys' fees, incurred by plaintiff in causing such sale.

3. That the United States Marshal shall conduct such foreclosure sale pursuant to the provisions of Minnesota Statutes, Chapter 581, relating to the foreclosure of mortgages by action, and thereafter make a report to this court.

4. That upon application of the proceeds of such sale to the amount

adjudged due herein, a deficiency judgment shall be entered and execution issued against defendants Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes, jointly and severally, to the extent that the judgment in this action is not fully satisfied by the proceeds of the mortgage foreclosure sale.

5. That the lien of plaintiff's mortgage is superior to all other liens or interests on, in or against the mortgaged premises held by the defendants herein, and the defendants shall be barred and foreclosed from any equity of redemption, lien, or interest in the property, except the statutory right to redeem from the foreclosure sale.

Dated: June 18, 1990

David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-223

Federal Deposit Insurance, Corporation, in its corporate capacity,

Plaintiff,

vs.

Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes,

Defendants.

ORDER

Steven J. Kluz, Esq., and Eric J. Magnuson, Esq., Rider, Bennett, Egan & Arundel, 2000 Lincoln Centre, 333 South 7th Street, Minneapolis, MN 55402, for the plaintiff.

Douglas M. McMillan, Esq., 2677 Lakeshore Avenue, St. Paul, MN 55117, for the defendants Hughes Development Company and Bernadette J. Hughes.

Francis R. Hughes, Pro Se, P.O. Box 7035, St. Paul, MN 55102.

This matter comes before the court on plaintiff's motion to vacate the foreclosure sale of September 6, 1990, and to order a resale.

Background

In 1982, defendants Francis and Bernadette Hughes signed a note, security agreement and mortgage deed for $100,000 in favor of Guaranty State Bank of St. Paul. The Hughes planned to use the loan proceeds to remodel a house (the "Lombard property"). In 1984, plaintiff Federal Deposit Insurance Corporation ("FDIC") was appointed receiver of Guaranty State Bank's property and business after the bank was declared insolvent. The FDIC purchased the Hughes' note and mortgage from Guaranty State Bank.

The Hughes defaulted on the mortgage, and in May, 1986, the FDIC commenced a foreclosure by action. On April 12, 1988, the court ordered the Hughes to tender $100,000 within one year, at which

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time the FDIC would release its security interest.

The Hughes failed to tender the $100,000, and on July 28, 1989, the FDIC brought a motion for foreclosure. In an order dated June 18, 1990, the court granted the FDIC's motion for sale of the property, to be held on September 6, 1990, pursuant to the procedures set forth in Minnesota Statutes Chapter 581.

The Hughes appealed this order and sought a stay pending their appeal. On September 4, 1990, the court agreed to stay the sale upon Hughes' posting of a supersedeas bond requested by the FDIC. Believing that the Hughes would post the bond and the court would grant the stay, the FDIC's attorney did not attend the foreclosure sale on September 6, 1990. At the foreclosure sale, Mr. Hughes bid

$10.00 for the property and the U.S. Marshal accepted his bid. The FDIC now seeks to vacate this sale.

Discussion

Minnesota courts have vacated mortgage sales and ordered new sales in cases where an error by an attorney has unfairly prejudiced the principal. See, e.g., Romkey v. Saumweber, 170 Minn. 438, 212 N.W. 816 (1927); Peterson v. First Nat'l Bank, 162 Minn. 369, 203 N.W. 53 (1925); TCF Banking & Sav. v. Loft Homes, Inc., 439 N.W.2d 735 (Minn. Ct. App. 1989). In TCF Banking and Savings, the Minnesota Court of Appeals examined three factors in determining whether to vacate a mortgage foreclosure sale: (1) the absence of negligence by the party seeking relief; (2) unjust enrichment at the mortgagee's expense if the sale is

not vacated; and (3) the ability of the court to return all parties to the status quo. 439 N.W.2d at 738-39 (interpreting Peterson). The present case meets all three criteria. It is undisputed that the FDIC was not negligent in this matter. See id. at 738 (specifically permitting recission when the mortgagee's attorney erred). By purchasing the property for $10.00, the Hughes would be unjustly enriched at the expense of the FDIC, in light of the underlying $100,000 debt owed to the FDIC. Id. at 738-39 (overturning sale because of the "gross and obvious disparity between the value and the redemption price"). Finally, this court has the power to restore the parties to the status quo by vacating the sale. See id. at 739 (noting that unless the mortgagor demonstrates either

detrimental reliance or subsequently acquired rights by a third party, a court will have the power to return parties to the status quo by vacating the sale). The Hughes have made no showing of detrimental reliance, or subsequently acquired rights by a third party, thus this court will restore the status quo by vacating the sale. Following this analysis, it is appropriate that the foreclosure sale of September 6, 1990 be vacated, and a new foreclosure sale ordered.

Accordingly, IT IS HEREBY ORDERED that:

1. The foreclosure sale of September 6, 1990 is vacated and a resale is hereby ordered.

2. The premises encumbered by the Lombard Mortgage, as described in the

FDIC's complaint, shall be sold at a foreclosure sale, as provided by law, with the proceeds of the sale applied to payment of the amount adjudged to be due.

3. The United States Marshal shall conduct such foreclosure sale pursuant to the provisions of Minnesota Statutes, Chapter 581, relating to the foreclosure of mortgages by action, and thereafter make a report to this court.

4. Upon application of the proceeds of such sale to the amount adjudged due, a deficiency judgment shall be entered and execution issued against defendants Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes, jointly and severally, to the extent that the judgment in this action is not fully satisfied by the proceeds of the mortgage foreclosure sale.

5. The lien of the FDIC's mortgage is superior to all other liens or interests on, in or against the mortgaged premises held by the defendants, and the defendants shall be barred and foreclosed from any equity of redemption, lien, or interest in the property, except the statutory right to redeem from the foreclosure sale.

Dated: October 10, 1990

David S. Doty, Judge
United States District Court

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-87-223

Federal Deposit Insurance, Corporation, in its corporate capacity,

Plaintiff,

v.

Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes,

Defendants.

ORDER

Steven J. Kluz, Esq., and Eric J. Magnuson, Esq., Rider, Bennett, Egan & Arundel, 2000 Lincoln Centre, 333 South 7th Street, Minneapolis, MN 55402, for the plaintiff.

Douglas M. McMillan, Esq., 2677 Lakeshore Avenue, St. Paul, MN 55117, for the defendants Hughes Development Company and Bernadette J. Hughes.

Francis R. Hughes, Pro Se, 1030 Lombard Avenue, St. Paul, MN 55105.

This matter comes before the court on defendants' ex parte motion for a stay of execution pending appeal, pursuant to

Federal Rules of Civil Procedure 62(f) and Minnesota Rule of Civil Appellate Procedure 108.01. Rule 62(f) of the Federal Rules of Civil Procedure requires that:

> In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

Id. Rule 108.01, subd. 1 of the Minnesota Rules of Civil Appellate Procedure states that:

> An appeal from an order or judgment shall stay proceedings in the trial court and save all rights affected thereby, if the appellant provides a supersedeas bond in the amount and form which the trial court shall order and approve, in the cases provided in this Rule.

Defendants have taken all the steps required to appeal two orders of this court dated June 18, 1990 and October 10, 1990.

Subdivision 5 of the rule further provides that:

> If the appeal is from a judgment directing the sale or delivery or possession of real property, the condition of the bond shall be the payment of the value of the use and occupation of the property from the time of the appeal until the delivery of the possession of the property if the judgment is affirmed ...

Minn. R. Civ. App. 108.01, subd. 5. To meet the requirements of Subdivision 5 regarding the value of the use of the property, the defendants have obtained three independent appraisals indicating that the present value of the use of the property is between $200 and $225 per month. Rule 108.01, subd. 5 does not provide clear guidelines, however, for

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the length of time which the bond should run. The rule states that the bond shall run "from the time of the appeal until the delivery of the possession of the property if the judgment is affirmed...." Defendants obtained a supersedeas bond for a total of eight months, relying on the Processing Schedule for Typical Civil Appeal from the Eighth Circuit Court of Appeals, which provides that the average time of an appeal from the filing of a notice of appeal until decision is 170 days, or roughly six months. The defendants added an additional two months, reasoning that this would be the period of time needed by the FDIC to advertise and hold a foreclosure sale. The defendants thus figure the proper amount of the supersedeas bond as $225 per month, for eight months, or $1,800,

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and have added an additional ten percent and obtained a supersedeas bond for $2,000.

Based on the foregoing, the court grants defendants' motion for a stay of execution pending appeal and approves the $2,000 supersedeas bond. Accordingly, **IT IS HEREBY ORDERED** that:

1. The foreclosure Gale on the property known as 1030 Lombard Avenue, St. Paul, Minnesota, scheduled for January 7, 1991, is stayed pending appeal of this matter;

2. Defendants' supersedeas bond of $2,000 is approved as payment of the value of the use and occupation of the property at 1030 Lombard Avenue pending the appeal; and

3. Defendants are ordered not to commit any waste on the property while it

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remains in their possession during the pendency of the appeal.

Dated: January 4, 1991

David S. Doty, Judge
United States District Court

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-5442

Federal Deposit Insurance Corporation, in its corporate capacity,

Appellee,

v.

Hughes Development Company, Inc., Francis R. Hughes, and Bernadette and Bernadette J. Hughes,

Appellants.

Federal Deposit Insurance, Corporation, in its corporate capacity,

Appellee,

v.

Hughes Development Company; Francis R. Hughes; Bernadette J. Hughes,

Appellants.

Submitted: June 7, 1991
Filed: July 11, 1991

Before McMILLIAN, FAGG and MAGILL, Circuit Judges.

McMILLIAN, Circuit Judge.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 91-1060

Francis R. Hughes and Bernadette J. Hughes appeal two orders of the district court for the District of Minnesota:[1] its June 18, 1990 order of foreclosure in favor of the Federal Deposit Insurance Corp. (FDIC), and its October 10, 1990 order vacating the foreclosure sale and ordering a new sale. For reversal the Hugheses argue that the district court erred in (1) conditioning their loan rescission under the Truth In Lending Act (TILA), 15 U.S.C. § 1635 (1988), upon tender of the loan principal

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1 The Honorable David S. Doty, United States District Judge for the District of Minnesota.

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to the FDIC; and (2) vacating the foreclosure sale held September 6, 1990, at which the Hugheses were the only bidders due to a mistake committed by the FDIC's attorney. For the reasons discussed below, we affirm both orders.

On June 18, 1982, the Hugheses acquired a $100,000 home improvement loan from Guaranty State Bank of St. Paul, and gave the bank a mortgage covering their residence. On June 20, 1984, the Hugheses sent a rescission notice to the bank pursuant to TILA asserting that the bank had failed to make required disclosures. Thereafter the bank was adjudged insolvent and the FDIC was appointed receiver. The FDIC purchased the Hugheses' note and mortgage. The FDIC subsequently notified the Hugheses that they were in default, and after the

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Hugheses failed to cure the default, the FDIC brought the instant foreclosure action in the district court. On April 13, 1988, the district court granted the Hugheses' motion for summary judgment in part, holding that the Hugheses were entitled to enforce the rescission under TILA, but conditioning their right of rescission upon their tender of the loan principal within one year. The order provided that failure to tender the funds within that time would entitle the FDIC to foreclose. Neither party appealed.

In November or December 1988 the FDIC rejected a settlement offer made by the Hugheses,[2] and on July 7, 1989, the FDIC brought a motion for summary

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[2] The Hugheses offered $10,000, three condominium garage stalls, and a two-year note for $66,000.

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judgment seeking a decree of foreclosure. Following a hearing, the court granted the motion on June 18, 1990, ordered foreclosure and provided for a deficiency judgment. The sale was set for September 6, 1990. On August 17, 1990, the Hugheses appealed the June 18, 1990 order and sought to stay the sale pending appeal. The FDIC requested that a bond be required to stay the sale. On September 4, 1990, the court agreed to stay the sale if the Hugheses posted a bond. The bond was never posted and the sale took place as scheduled. Believing the Hugheses would post the bond and the court would grant the stay, the FDIC did not attend; Mr. Hughes bid ten dollars and the United States Marshal accepted his bid.

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On September 21, 1990, the FDIC filed a motion to vacate the sale. The FDIC filed the affidavit of its attorney which stated that after communication with court personnel on September 4, 1990, he believed the Hugheses would post the bond, but that he did not check with the court or the marshal's office on September 5 or 6, 1990, to determine if the sale had, in fact, been stayed. On October 10, 1990, the district court, applying Minnesota law, vacated the sale and ordered a new sale. The Hugheses appealed. They have obtained a stay of the resale pending these appeals.

While it is not entirely clear whether the April 13, 1988 order of the district court was a final appealable order, the Hugheses' argument that the district court erred in conditioning

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their rescission on the return of the principal is, in any event, without merit. TILA generally provides that the creditor shall perform first (i.e., return monies paid by the debtor and release its security interest); however, the Act gives courts discretion to devise other procedures, 15 U.S.C. § 1635(b), including conditioning rescissions upon the debtor's prior return of the principal. See Rudisell v. Fifth Third Bank, 622 F.2d 243, 254 (6th Cir. 1980); Powers v. Sims & Levin, 542 F.2d 1216,

1222 (4th Cir. 1976); LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976).[3]

Whether the court erred in vacating the September 6, 1990 foreclosure sale is controlled by Minnesota law. We review questions of state law de novo. Salve

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The Hugheses' argument that their fall or winter 1988 settlement offer satisfied the condition of the April 13, 1988 order is meritless. See, e.g., Bustamante v. First Fed. Sav. & Loan Ass'n, 619 F.2d 360, 365 (5th Cir. 1980) (borrower must restore lender to status quo.

The Hugheses' argument that TILA precluded the district court from awarding interest, taxes and attorneys' fees is also without merit. TILA does not apply to the court's award because the Hugheses failed to rescind under TILA. The foreclosure was ordered pursuant to Minnestoa law which gives the court discretion to make such awards. See Minn. Stat. Ann. §§581.03, 582.01 (attorneys' fees) (West 1988); Spencer v. Levering, 8 Minn. 461 (1863) (taxes paid by mortgage may be recovered as a part of mortgage debt).

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Reaina College v. Russell, 111 S. Ct. 1217, 1221 (1991). As the district court noted, Minnesota courts have vacated foreclosure sales where mortgagees' attorneys' mistakes have unfairly prejudiced the mortgagees. Romkev v. Saumweber, 170 Minn. 438, 212 N.W. 816 (1927) (Romkev) (attorney mistakenly excluded most valuable lots from foreclosure sale); Peterson v. First National Bank, 162 Minn. 369, 203 N.W. 53 (1925) (Peterson) (attorney grossly underbid property and appellants tried to exercise their right to redeem at bid price); TCF Banking & Savinas, F.A. v. Loft Homes, Inc., 439 N.W.2d 735 (Minn. Ct. App. 1989) (TCF Banking) (same).

These cases employ an equity analysis established in Peterson. In Peterson, the court explained that the

sale would be vacated given the following equitable considerations: (1) the mortgagee was blameless and had fallen into serious error which promised a disastrous result; (2) the mortgagee was not negligent; (3) the defendants (the mortgagor in conspiracy with others who had liens on the property) had knowledge of the mortgagee's mistake and attempted, by inequitable conduct, to secure an unconscionable advantage of mortgagee and unjustly enrich themselves at his expense; and (4) the court could restore the status quo. 203 N.W. at 56.

The Hugheses argue they were not unjustly enriched because the FDIC was still entitled to a deficiency judgment; but, in Peterson, elimination of the security interest constituted unjust enrichment. The court in that case said

the claim, minus the mortgage, was "worthless" given the mortgagor's apparent insolvency. Id. at 53. The Hugheses assert they did not know of the mistake made by the FDIC's attorney. In Romkev, however, the court apparently inferred knowledge that a mistake had occurred from the great disparity between the value of the property and the bid. Romkev, 212 N.W. at 816. Knowledge of how the mistake is made has not been required. TCF Bankina, 439 N.W.2d at 738. Finally, the Hugheses assert they engaged in no inequitable conduct: they made the low bid in good faith only after being informed that no minimum bid was required and on the basis of news reports about government properties being auctioned for as little as one dollar. Yet, in Romkev the sale was vacated even

though the mortgagor engaged in no affirmative misconduct -- he simply stood to gain the release of the mortgage on the most valuable lots, including the residence, because the mortgagee failed to designate those lots for foreclosure. 212 N.W. at 816. In sum, we conclude that the district court properly' vacated the September 6, 1990 foreclosure sale.

Accordingly, the orders of the district court are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 90-5442-91/1060MN

Federal Deposit Insurance Corporation, in its corporate capacity,

Appellee,

v.

Hughes Development Company, Inc., Francis R. Hughes, and Bernadette J. Hughes,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Judgment of this court affirming the judgment of the district court was entered July 11, 1991. Subsequently-filed motions are ruled as follows:

1. The motion to dismiss filed by Hughes Development Company, et al., is denied.

2. The motion of the Federal Deposit Insurance Corporation to substitute

Great Plains Capital Corporation as appellees in its stead is granted.

3. Appellants' petition for rehearing is denied.

4. The motion of Douglas W. Keenan to withdraw as counsel for appellants is granted.

September 24, 1991

ORDER ENTERED AT THE DIRECTION OF THE COURT.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT